

APR 12 1972

MICHAEL RODAK, JR.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1972

No. 72-654

UNITED STATES OF AMERICA, *Petitioner*

v.

ARCHIE L. MASON, ET AL., *Respondents.*

**BRIEF OF NATIVE AMERICAN RIGHTS FUND
AS AMICUS CURIAE IN SUPPORT OF
RESPONDENTS**

DAVID H. GETCHES
REID PEYTON CHAMBERS
MONROE E. PRICE
1506 Broadway
Boulder, Colorado 80302

TOPICAL INDEX

	Page
Interest of <i>Amicus Curiae</i>	1
Argument	2
I. Nature and Scope of the Federal Trust Responsibility	4
II. Pertinent Principles Derived From The Federal Trust Responsibility Constitute the Basis for Immunity of Indian Allottees From State Taxation	8
A. The Law Prior to <i>West</i>	8
B. The Decisions in <i>Oklahoma Tax Commission</i> and in <i>West</i>	11
III. The Executive Departments of the United States Were Obligated By Ordinary Fiduciary Principles To Commence Litigation Challenging the Validity of <i>West</i>	14
IV. This Court Should Overrule <i>West</i>	21
Conclusion	22

TABLE OF CITATIONS

CASES:

Agua Caliente Band of Mission Indians v. County of Riverside, 442 F. 2d 1184 (9th Cir. 1971), <i>cert. denied</i> , 405 U.S. 933 (1972)	9
Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918)	7
Arenas v. United States, 140 F. Supp. 606 (S.D. Cal. 1956)	14
Asenap v. United States, 283 F. Supp. 566 (W.D. Okla. 1968)	13
Big Eagle v. United States, 300 F. 2d 765 (Ct. Cl. 1962)	13
Board of Commissioners v. Seber, 318 U.S. 705 (1943)	11
Board of Commissioners v. United States, 100 F. 2d 929 (10th Cir.) <i>modified on other grounds</i> , 308 U.S. 343 (1939)	9
Brader v. James, 246 U.S. 88 (1918)	5

	Page
Carpenter v. Shaw, 280 U.S. 363 (1930)	7, 10, 12
Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) ..	4
Cherokee Nation v. Hitchcock, 187 U.S. 294 (1902)	4, 5
Cherokee Nation v. Southern Kansas R. Co., 135 U.S. 295 (1890)	4, 5
Childers v. Beaver, 270 U.S. 555 (1926)	9
Choate v. Trapp, 224 U.S. 665 (1912)	4, 6, 7, 10, 12
Choctaw Nation v. United States, 119 U.S. 1 (1886) ...	4
Cramer v. United States, 261 U.S. 219 (1923)	4
Federal Power Commission v. Tuscarora Indian Na- tion, 362 U.S. 99 (1960)	20
Fellows v. Blacksmith, 60 U.S. (19 How.) 366 (1857) ..	4
Heckman v. United States, 224 U.S. 413 (1912)	4
Helvering v. Mountain Producers Corp., 303 U.S. 376 (1938)	18
Kirkwood v. Arenas, 243 F. 2d 863 (9th Cir. 1957) ..	13, 14, 21
Lone Wolf v. Hitchcock, 187 U.S. 553 (1903)	4, 6, 20
McClanahan v. Arizona State Tax Commission, decided March 27, 1973, slip opinion	9, 13
Menominee Tribe v. United States, 391 U.S. 404 (1968) ..	6, 7
Menominee Tribe v. United States, 101 Ct. Cls. 10 (1944)	8, 20
Mescalero Apache Tribe v. Jones, decided March 27, 1973, slip opinion	12
Morrow v. United States, 243 Fed. 854 (8th Cir. 1917) ..	9
Nash v. Wiseman, 227 F. Supp. 552 (W.D. Okla. 1963) ..	13
Navajo Tribe v. United States, 364 F. 2d 320 (Ct. Cl. 1966)	8, 20
Oklahoma Tax Commission v. Texas Co., 336 U.S. 342 (1949)	9
Oklahoma Tax Commission v. United States, 319 U.S. 598 (1943)	3, 8, 11, 17
Perrin v. United States, 232 U.S. 478 (1914)	4
Seminole Nation v. United States, 316 U.S. 286 (1942) ..	4, 8
Shaw v. Gibson-Zahniser Oil Corp., 276 U.S. 575 (1928)	10, 11
Shelton v. Lockhart, 154 F. Supp. 244 (W.D. Mo. 1957) ..	14
Shoshone Tribe v. United States, 299 U.S. 476 (1937) ..	4, 5
Squire v. Capoman, 351 U.S. 1 (1956)	3, 6, 7, 9, 13, 14, 18, 21
Sunderland v. United States, 266 U.S. 226 (1924)	5
Thomas v. Gay, 169 U.S. 264 (1898)	9

Index Continued

iii

Page

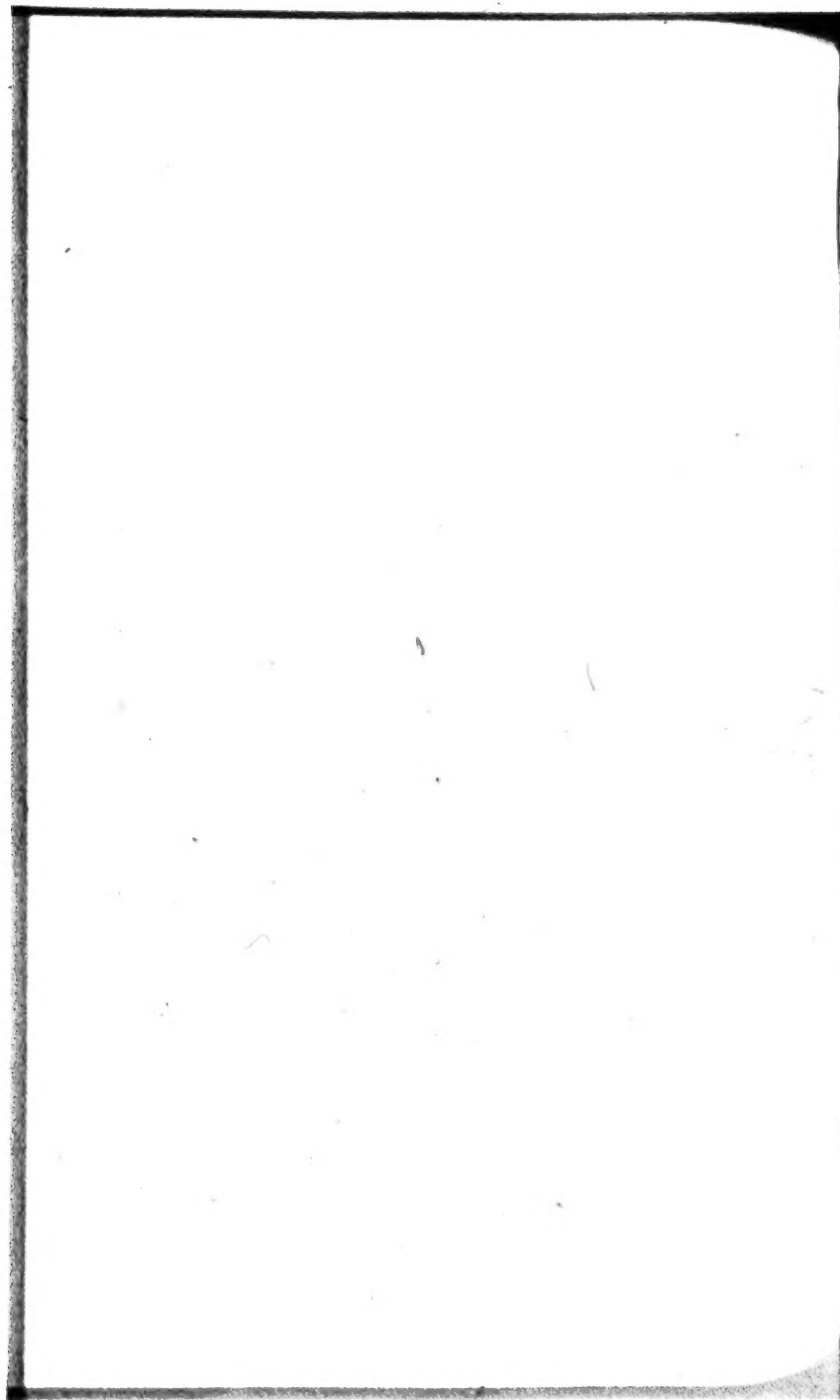
Tiger v. Western Investment Co., 221 U.S. 286 (1911) ..	4, 5
Tulee v. State of Washington, 315 U.S. 681 (1942)	4
United States v. Alcea Band of Tillamooks, 329 U.S. 40 (1946)	4
United States v. Benewah County, 290 Fed. 628 (9th Cir. 1923)	9
United States v. Candelaria, 271 U.S. 432 (1926)	4
United States v. Creek Nation, 295 U.S. 103 (1935) 4, 5, 7, 8	
United States v. Glacier County, 99 F. 2d 733 (9th Cir. 1938)	9
United States v. Hallam, 304 F. 2d 620 (10th Cir. 1962)	13
United States v. Kagama, 118 U.S. 375 (1886)	4, 5
United States v. Nice, 241 U.S. 591 (1916)	4
United States v. Payne, 264 U.S. 446 (1924)	4, 6, 8
United States v. Pelican, 232 U.S. 442 (1914)	4
United States v. Rickert, 188 U.S. 432 (1903)	9, 10, 11, 12, 14
United States v. Sandoval, 231 U.S. 28 (1913)	4
United States v. Santa Fe Pacific R. Co., 314 U.S. 339 (1941)	4, 6, 20
United States v. Thurston County, 143 Fed. 287 (8th Cir. 1902)	9
West v. Oklahoma Tax Commission, 334 U.S. 717 (1948)	2, 3, 8, 10, 11, 12, 13, 14, 18, 21

STATUTES:

28 U.S.C. § 2415(a), (g)	16
Act of June 20, 1936, 49 Stat. 1542	11
Act of May 19, 1937, 50 Stat. 188	11
Oklahoma Statutes § 68-227 (1970 Supp.)	16

OTHER AUTHORITIES:

Felix S. Cohen, <i>Handbook of Federal Indian Law</i> (1942)	9
Message of President Nixon to Congress Transmitting Recommendations for Indian Policy, 116 Cong. Rec. 23, 131 (1970)	15
Rev. Rul. 69-164, 1969, 1 Cum. Bull. 220	19
A. Scott, <i>Law of Trusts</i> (3d Ed. 1967)	8, 15, 16, 17, 19



IN THE
Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-654

UNITED STATES OF AMERICA, *Petitioner*

v.

ARCHIE L. MASON, ET AL., *Respondents*.

**BRIEF OF NATIVE AMERICAN RIGHTS FUND
AS AMICUS CURIAE IN SUPPORT OF
RESPONDENTS**

The Native American Rights Fund files the following brief *amicus curiae* with the consent of petitioners United States and State of Oklahoma and respondents Archie L. Mason et al. Written consents of all parties, by letter, are on file with the Clerk of this Court.

INTEREST OF AMICUS CURIAE

The Native American Rights Fund [hereinafter the Fund] is a private, non-profit corporation organized for the purpose of protecting the rights and enhancing

the general welfare of American Indians and providing legal representation and counsel to Indians in cases of major significance. The Fund appears and submits this brief *amicus curiae* because of its general interest in the subject of state taxation of Indians and Indian property, and in the enforcement of the federal trust responsibility toward Indians. The Fund has several Indian tribal and individual clients in cases which concern the validity of several forms of state taxation within Indian Country, and in cases which concern the fiduciary duties of executive officials of the United States to Indian tribes and individuals.

Since this case will establish an important precedent as regards the power of states to tax Indian allottees, and with respect to the fiduciary duties of federal executive officials affirmatively to protect Indian property, the Native American Rights Fund files this brief in support of the decision of the Court of Claims and the position of the respondents.

ARGUMENT

The Native American Rights Fund as *amicus curiae* believes that the Court of Claims correctly held that the United States violated its fiduciary duties as trustee by its failure to commence litigation to challenge the continued validity of *West v. Oklahoma Tax Commission*, 334 U.S. 717 (1948). As the decision of the Court of Claims so carefully shows, the authority of *West* had been sufficiently eroded by the late 1960s that a reasonable and prudent trustee should have commenced such litigation.

The decision of the court below and the brief of the respondents deal comprehensively with the cases

and executive actions subsequent to *West* which called the validity of that decision into question, and with the issue of whether this Court should now overrule *West*. The Fund will take a somewhat more historical approach, concentrating upon the federal trust responsibility. First, we will discuss the nature and scope of the federal trust responsibility to Indians, including the Osage allottees, on which the liability of the United States to the respondents is based. Secondly, we will show how the basic principles of this historic trust responsibility have been observed in almost every case decided by this Court involving state taxation of Indians, save for *West* and its predecessor, *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943). The trust responsibility, and its corollary that ambiguous congressional enactments should be construed to provide maximum protection to Indian property, constitutes a sufficient basis for immunity of Indian allotments from state taxation—apart from and independent of the “instrumentality” doctrine laid to rest by *West* and its predecessor case. These principles as well formed the basis for this Court’s subsequent decision in *Squire v. Capoeman*, 351 U.S. 1 (1956). Given this history, and the principle established by decisions of this Court that the executive departments of the United States must observe at least the obligations of an ordinary trustee toward Indian allottees, the Fund submits that the United States was obligated to bring suit challenging the continued validity of the specific holding in *West* (although not the rejection by *West* of the “instrumentality” doctrine). The United States was thus properly held liable for its failure to commence litigation. And since the Fund concludes that the holding in *West* (although not its reasoning concerning taxation of “instrumentalities”) should be

overruled, we submit that the United States was also properly held liable for the full amount of the tax paid to the state.

I. NATURE AND SCOPE OF THE FEDERAL TRUST RESPONSIBILITY

The trust responsibility has been recognized and applied in more than a score of decisions by this Court,¹ beginning with Chief Justice Marshall's *Cherokee Nation v. Georgia*,² 30 U.S. (5 Pet.) 1 (1831), and continuing to the present day. While this trust responsibility

¹ E.g., *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet) 1 (1831); *Fellows v. Blacksmith*, 60 U.S. (19 How) 366 (1857); *United States v. Kagama*, 118 U.S. 375 (1886); *Choctaw Nation v. United States*, 119 U.S. 1, 28 (1886); *Cherokee Nation v. Southern Kansas R. Co.*, 135 U.S. 295 (1890); *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 305 (1902); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 564 (1903); *Tiger v. Western Investment Co.*, 221 U.S. 286 (1911); *Heckman v. United States*, 224 U.S. 413 (1912); *Choate v. Trapp*, 224 U.S. 665, 675 (1912); *United States v. Sandoval*, 231 U.S. 28, 45-46 (1913); *United States v. Pelican*, 232 U.S. 442 (1914); *Perrin v. United States*, 232 U.S. 478 (1914); *United States v. Nice*, 241 U.S. 591 (1916); *Cramer v. United States*, 261 U.S. 219 (1923); *United States v. Payne*, 264 U.S. 446, 448 (1924); *United States v. Candelaria*, 271 U.S. 432 (1926); *United States v. Creek Nation*, 295 U.S. 103 (1935); *Shoshone Tribe v. United States*, 299 U.S. 476 (1937); *United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339 (1941); *Tulee v. State of Washington*, 315 U.S. 681 (1942); *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942); *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 47 (1946).

² *Cherokee Nation* was an action filed in this Court by the tribe to enjoin enforcement of Georgia statutes comprehensively regulating activities on the Cherokee reservation in that state. Chief Justice Marshall, speaking for the Court, held that the tribe was not a "state" as the term is used in Article III, Section 2 of the Constitution: hence the Court did not have original jurisdiction over the case. Explaining his holding, Marshall characterized the juridical relationship of Indian tribes to the United States as "perhaps unlike that of any other two people in existence." 30 U.S. (5

has been used in various contexts, and its exact attributes may vary depending upon particular treaties and statutes pertaining to individual tribes, certain principles of general application emerge from the decisions of this Court.

The first principle pertains to the construction of legislative enactments. Although Congress possesses a "plenary" power³ to manage Indian property—a

Pet.) at 16. While conceding that Indian tribes do possess some attributes of national sovereignty, and of "statehood," the Court held them to be "domestic dependent nations." In large measure, the Chief Justice based his analysis upon the observation that Indian tribes were dependent upon the United States for protection rather than existing as independent sovereignties. "Their relation to the United States," he concluded, "resembles that of a ward to his guardian." *Id.* at 17.

³ This "plenary" power was held by this Court itself to derive from the trust responsibility of Congress to the Indians. For example, in *United States v. Kagama*, 118 U.S. 375 (1886), this Court sustained the validity of a federal criminal code applying to Indian reservations by relying upon the trust responsibility as a basis for congressional power. The Court first concluded that Article I, Section 3, clause 8—which confers explicitly upon Congress the "power to regulate Commerce with the Indian Tribes"—did not authorize enactment of the criminal code. But the Court sustained the constitutionality of the legislation by relying on the government's fiduciary relationship to the Indians. It held that "these Indian tribes are the wards of the nation. They are communities dependent on the United States. . . . From their very weakness and helplessness . . . there arises the duty of protection and with it the power." 118 U.S. *supra* at 383-384 (emphasis in original) See also *Sunderland v. United States*, 266 U.S. 266, 233-234 (1924); *Brader v. James*, 246 U.S. 88, 96 (1918); *Tiger v. Western Investment Co.*, 221 U.S. 286 (1911); *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 305 (1902); *Cherokee Nation v. Southern Kansas R. Co.*, 135 U.S. 295 (1890).

More recent decisions of this Court have concentrated upon the trust responsibility as a limitation on the power of Congress and executive officials. *E.g.*, *Shoshone Tribe v. United States*, 299 U.S. 476 (1937); *United States v. Creek Nation*, 295 U.S. 103 (1935).

power which may even extend to the abrogation of treaty rights, e.g., *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903)—the courts will presume that Congress has acted in good faith and intends protection of Indian property unless a contrary intent unmistakably appears. Consequently, statutes will not ordinarily be construed to authorize a taking of Indian property rights by implication. *Menominee Tribe v. United States*, 391 U.S. 404 (1968); *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339, 353-354 (1941); *United States v. Payne*, 264 U.S. 446, 448 (1924). Similarly, statutes which are ambiguous in their language are to be construed to provide the fullest protection of Indian property rights. This last principle has been applied several times by this Court in cases involving state and federal taxation of individual Indian allotments, the most recent of which is *Squire v. Capoeman*, 351 U.S. 1 (1956). In *Choate v. Trapp*, 224 U.S. 665 (1912), this Court considered whether a statutory exemption of allotted reservation lands from state taxation had been repealed by implication by a second statute which removed certain restrictions on alienation imposed by the first statute. The state officials who were parties to the case relied upon the general principle that tax exemptions should be narrowly construed. After conceding the general applicability of that doctrine, the Court held that:

“But in the government’s dealings with the Indians, the rule is exactly the contrary. The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people who are wards of the nation . . .” 224 U.S. *supra* at 675.

This Court followed the *Choate* principle in *Carpenter v. Shaw*, 280 U.S. 363, 366-367 (1930) and in *Squire v. Capoeman*, 351 U.S. *supra* at 6-7. See also *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 87-88 (1918); *Menominee Tribe v. United States*, 391 U.S. 404 (1968). Since the Osage allotments and mineral headrights are held by the United States in trust for the Indians, and are administered by the United States, there can be no question that the trust responsibility pertains to them.

A second principle established in decisions by this Court is that the federal trust responsibility strictly limits executive authority and discretion to administer Indian property and affairs. A leading case is *United States v. Creek Nation*, 295 U.S. 103 (1935), where this Court affirmed a portion of a decision by the Court of Claims awarding the tribe money damages for lands which had been excluded from their reservation and sold to non-Indians pursuant to an incorrect federal survey of reservation boundaries. This Court bot-tomed its decision on the federal trust doctrine:

“The tribe was a dependent Indian community under the guardianship of the United States and therefore its property and affairs were subject to the control and management of that government. But this power to control and manage was not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it was subject to *limitations inhering in such a guardianship* and to pertinent constitutional restrictions.” 295 U.S. *supra* at 109-110 (emphasis supplied).

Creek Nation stands for the proposition that—unless Congress has expressly directed otherwise—the federal

executive is held to a strict standard of compliance with fiduciary duties. The executive must exercise due care in its administration of the property; it may not "give the tribal lands to others, or . . . appropriate them to its own purposes." 295 U.S. *supra* at 110.⁴ Decisions of this Court reviewing the lawfulness of administrative conduct managing Indian property have held officials of the United States to "obligations of the highest responsibility and trust" and "the most exacting fiduciary standards," and to be bound "by every moral and equitable consideration to discharge its trust with good faith and fairness." *Seminole Nation v. United States*, 316 U.S. 286, 296-297 (1942); *United States v. Payne*, 264 U.S. 446, 448 (1924). Decisions of the Court of Claims have uniformly held that *at least* the ordinary standards of a private fiduciary must be adhered to by executive officials administering Indian property. *E.g.*, *Menominee Tribe v. United States*, 101 Ct. Cls. 10, 18-19 (1944); *Navajo Tribe v. United States*, 364 F. 2d 320, 322-324 (Ct. Cls. 1966).

II. PERTINENT PRINCIPLES DERIVED FROM THE FEDERAL TRUST RESPONSIBILITY CONSTITUTE THE BASIS FOR IMMUNITY OF INDIAN ALLOTTEES FROM STATE TAXATION

A. The Law Prior to *West*

Prior to *West v. Oklahoma Tax Commission*, 334 U.S. 717 (1948) and its predecessor *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943), Indian allotments and the income therefrom were al-

⁴ *Creek Nation* concerns the obvious prohibition against appropriating trust assets by the trustee. This duty stems directly from the duty of loyalty, which Professor Scott has called "the most fundamental duty owed by the trustee to the beneficiaries." A. Scott, *Law of Trusts*, p. 1297 (3d Ed., 1967).

most uniformly considered exempt from state taxation.⁵ See generally, FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW, (1942), pp. 254-265.⁶ This Court prior to 1943 had held allotments and other trust property immune from state property taxation, *e.g.*, *United States v. Rickert*, 188 U.S. 432 (1903), and from state inheritance taxes, *Childers v. Beaver*, 270 U.S. 555 (1926). Lower federal courts had generally anticipated and followed these rulings,⁷ and had also held that proceeds from the sale or lease of allotted lands are exempt from state income taxation.⁸ This immunity was based to some extent upon the notion that allotments were an "instrumentality" of the federal government. *United States v. Rickert*, 188 U.S. 432, 438-439 (1903). But

⁵ A somewhat different question is presented where the state seeks to tax non-Indian lessees of allotments in connection with their business activities there. *Oklahoma Tax Commission v. Texas Co.*, 336 U.S. 342 (1949); *Thomas v. Gay*, 169 U.S. 264 (1898); *Agua Caliente Band v. County of Riverside*, 442 F.2d 1184 (9th Cir. 1971), *cert. denied*, 405 U.S. 933 (1972); See generally *McClanahan v. Arizona Tax Commission*, — U.S. —, (No. 71-834 decided March 27, 1973).

⁶ Mr. Cohen has been recognized by this Court as "an acknowledged expert in Indian law." *Squire v. Capoman*, 351 U.S. 1, 8-9 (1956). In that decision, the Court also noted that "Mr. Cohen was Chairman of the Department of the Interior Board of Appeals and Assistant Solicitor of the Department. The Handbook has a foreword by Harold L. Ickes, then Secretary of the Interior, and was printed by the United States Printing Office." 351 U.S. at 9, n. 15.

⁷ *E.g.*, *Board of Com'rs v. United States*, 100 F.2d 929 (10th Cir.), *mod. on other grounds* 308 U.S. 343 (1939); *United States v. Glacier County*, 99 F.2d 733 (9th Cir. 1938); *United States v. Benewah County*, 290 Fed. 628 (9th Cir. 1923); *Morrow v. United States*, 243 Fed. 854 (8th Cir. 1917).

⁸ *United States v. Thurston County*, 143 Fed. 287 (8th Cir. 1902)

an independent ground for the tax exemption was the national policy embodied in the trust responsibility that the United States had a duty to protect and care for the Indians. This was expressed in *Rickert* as follows:

"These Indians are yet wards of the Nation, in a condition of pupillage or dependency, and have not been discharged from that condition. They occupy these lands [as] . . . part of the national policy by which the Indians are to be maintained as well as prepared for assuming the habits of civilized life. . . ." 188 U.S. at 437.

In similar fashion, in *Choate v. Trapp*, 224 U.S. 665 (1912) and *Carpenter v. Shaw*, 280 U.S. 363 (1930), the tax immunity was based upon the trust doctrine that silent or ambiguous statutes should be construed favorably to the Indians.

The only deviation, prior to *West*, from the principle that allottees were immune from state taxation was the holding in *Shaw v. Gibson-Zahniser Oil Corp.*, 276 U.S. 575 (1928). That case concerned off-reservation allotments purchased for individual Indians by the United States with restricted funds. While these lands were held in trust for the allottees, they differed from allotments created under the General Allotment Act of 1887 in that they had once been private lands, and had been purchased by the United States pursuant to a later statute. The Court held that since Congress had not expressly exempted these allotments from state property taxation, they "might be subject to that taxation unless Congress speaks." 276 U.S. at 581.⁹ But Con-

⁹ The Court was evidently concerned that purchases of private, taxable lands for Indians would otherwise too greatly diminish the State's tax base. 276 U.S. at 581-582.

gress responded to the *Shaw* decision by enacting a specific tax exemption for individual homestead allotments purchased out of restricted funds.¹⁰ These statutes manifested congressional adherence to the historic trust relationship toward preserving Indian trust property from state taxation.

B. The Decisions in *Oklahoma Tax Commission* and in *West*

In *West*, over the dissent of three Justices, this Court held that trust property of Osage allottees was subject to state inheritance taxes. The Court in *West* distinguished *United States v. Rickert*, 188 U.S. 432 (1903), as involving direct property taxation, but also questioned the continued vitality of the federal instrumentality doctrine, which it stated to be "the very foundation upon which the *Rickert* case rested . . ." 334 U.S. at 726. The Court held that Congress must "in some affirmative way" manifest an intention that these allotments be exempt from taxation.

West was preceded by this Court's decision in *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943), an action brought by the United States for a refund of state estate taxes assessed and paid on cash and securities and lands of deceased Indian allottees. This property was owned in fee by the Indians but restricted by statute against alienation.¹¹ In a five-to-

¹⁰ Act of June 20, 1936, 49 Stat. 1542, as amended by Act of May 19, 1937, 50 Stat. 188. This Court sustained the validity of these enactments in *Board of Commissioners v. Seber*, 318 U.S. 705, 715 (1943), relying upon "the existence of federal power to regulate and protect the Indians and their property against interference even by a state. . ."

¹¹ Consequently, the full force of the trusteeship principles may not be pertinent to the facts of that case.

four decision, this Court held that the state might tax the cash and securities, but not the lands. The Court's decision rested partly on the unique legislative history of the enactment imposing the restrictions.¹² The majority opinion did acknowledge that the "statute must be [interpreted] in accord with the generous and protective spirit which the United States properly feels toward its Indian wards,"¹³ but declined to read the statute as extending a tax immunity to these allottees. As in *West*, the Court appeared to interpret *Rickert* as resting solely on the intergovernmental "instrumentality" doctrine.¹⁴

The Fund submits that these two decisions incorrectly perceived the basis for this Court's earlier holding in *Rickert*, and for the general immunity of Indian allottees from state taxation. That immunity in part was premised on the instrumentality doctrine, but it also rested upon the federal trust obligations to the Indians, as this Court recently recognized when it acknowledged the continuing vitality of *Rickert*¹⁵ despite the demise of the instrumentality principle. The analysis of the Court in *West* that the instrumentality doctrine should be constricted survives. But *West* ignored the important federal trust obligations, announced in *Rickert*, *supra*, *Choate v. Trapp*, *supra*, and *Carpenter v. Shaw*, *supra*, that doubtful statutory expressions should be construed to protect Indian allottees from state taxation and that state taxation was

¹² 319 U.S. *supra* at 604-607

¹³ *Id.* at 607.

¹⁴ *Id.* at 603.

¹⁵ *Mescalero Apache Tribe v. Jones*, decided March 27, 1973, slip op., p. 13, 14.

inconsistent with the congressional purpose manifested in the allotment program. An express affirmative indication of tax immunity by Congress is not required.¹⁶

The historic and well-established principles of the federal trust responsibility articulated in virtually every case prior to *West* were reasserted by this Court in *Squire v. Capoeman*, *supra*, and in every subsequent lower court case to consider state taxation of Indian allottees.¹⁷ For example, the Court in *Squire* held the proceeds from timber sales of allottees exempt from the federal capital gains tax, "although" the statutory provision is not expressly couched in terms of non-taxability." 351 U.S. *supra* at 6. Silence, then, was construed in the Indians' favor, in part because the timber was a depletable resource. The Court observed that "unless the proceeds of the timber sale are preserved for the respondent, he cannot go forward when declared competent with the necessary chance of economic survival in competition with others." *Id.* at 10. Here, too, the subsurface minerals are a depletable resource, the proceeds from which must be preserved if the Osage allottees are to stand on their own feet when the trust period expires in 1984.

¹⁶ As this Court recently noted in *McClanahan v. Arizona State Tax Commission*, decided March 27, 1973, slip op, p. 13: "narrower statutes authorizing States to assert tax jurisdiction over reservations in special situations are explicable only if Congress assumed that the States lacked the power to impose the taxes without special authorization."

¹⁷ *Kirkwood v. Arenas*, 243 F.2d 863 (9th Cir. 1957); *Big Eagle v. United States*, 300 F.2d 765 (Ct. Cl. 1962); *United States v. Hallam*, 304 F.2d 620 (10th Cir. 1962); *Nash v. Wiseman* 227 F. Supp. 552 (W.D. Okla. 1963); *Asenap v. United States*, 283 F. Supp. 566 (W.D. Okla. 1968). These cases are fully discussed by the Court of Claims and in the brief of the respondents.

The precise holding in *West*, then, was left as a lonely exception to the mainstream doctrine rearticulated in *Squire* and subsequent cases.¹⁸ After *Squire*, *West* reasonably could be read as rejecting earlier cases (such as *United States v. Rickert*, *supra*) only to the extent those cases held allottees to be exempt from state taxation on the ground that Indian allotments were "instrumentalities" of the federal government. Since immunity for trust property of the Osage allottees from state inheritance taxes could be justified on the other principles that formed the basis for *Squire*, the United States as trustee for respondent and other Osage Indians should have brought an action to challenge the continued validity of the holding in *West*.

III. THE EXECUTIVE DEPARTMENTS OF THE UNITED STATES WERE OBLIGATED BY ORDINARY FIDUCIARY PRINCIPLES TO COMMENCE LITIGATION CHALLENGING THE VALIDITY OF WEST

That its executive departments owe the duty to adhere to the standard of *at least* an "ordinary fiduciary" in the management of Indian property is a proposition we are certain the United States does not dis-

¹⁸ It is instructive that—prior to the decision below—*West* had been cited only three times by lower federal courts in twenty-five years, and was not even referred to in *Squire*. In each case, moreover, the Indians had been held exempt from taxation. In *Kirkwood v. Arenas*, 243 F.2d 863 (9th Cir. 1957) allotments pursuant to Mission Indian Act were held exempt from state income and inheritance taxes; *Squire* was held controlling, and *West* was distinguished as applicable only to the Osage statute. (It is noteworthy that the United States Attorney in *Kirkwood* represented the Indians seeking exemption.) Accord: *Shelton v. Lockhart*, 154 F. Supp. 244 (W.D. Mo. 1957); *Arenas v. United States*, 140 F. Supp. 606 (S.D. Cal. 1956) (the lower court determination of *Kirkwood*).

pute.¹⁹ However, as Professor Scott observes, where "a particular trustee has greater skill or more facilities than those of the ordinary prudent man, . . . he is under a duty to exercise the skill that he has and to employ the facilities which are available to him."²⁰ The United States is plainly no "ordinary man." It is particularly surprising in this case that the officials within the Department of the Interior administering this trust property took no steps whatever to use the expansive facilities of the United States government in considering and evaluating their actions—no opinions of the Department's Solicitor or the Attorney General were sought, no efforts to consult with tax experts in the Departments of Justice or the Treasury were made.

The most directly pertinent fiduciary duties in this case are the duties of a trustee to enforce claims of the trust against third persons and to defend claims of third persons against the trust.²¹ Of course, the trustee is not obliged to bring all conceivable claims, nor is he held to the strict liability of an insurer. His duty is defined by Professor Scott as follows: "to take *reasonable* steps to realize on claims which he holds in trust.

¹⁹ The Brief for the United States, pp. 6-13, implicitly assumes that it is bound by this standard. As President Nixon observed in his July 8, 1970 Message to Congress Transmitting Recommendations for Indian Policy:

"The United States Government acts as a legal trustee for the land and water rights of American Indians. These rights are often of critical economic importance to the Indian people; frequently, they are also the subject of extensive legal dispute." 116 Cong. Rec. 23, 131 (1970).

²⁰ A. SCOTT, LAW OF TRUSTS, p. 1410 (3d Ed. 1967)

²¹ A. SCOTT, LAW OF TRUSTS, Section 177-178 (3d Ed. 1967).

If he fails *to take such steps as are reasonable*, he is subject to a surcharge for such loss as results from his failure to act."²² (emphasis supplied) The question, therefore, is whether it was "reasonable under the circumstances"²³ for the United States to pay Oklahoma inheritance taxes in the late 1960s²⁴ without instituting proceedings to challenge the imposition of the taxes.

The reasonableness of the trustee's inaction must be evaluated against the general fiduciary precept that—while a trustee "has a certain amount of discretion"—"ordinarily he should defend actions . . . which if successful would cause a loss to the trust estate."²⁵ It is true, as the United States points out (quoting Scott), that the trustee "does not necessarily act unreasonably in paying a claim . . . he believes . . . is not well founded." (Brief for United States, p. 8.) But the

²² Id. at 1424.

²³ Id. at 1428.

²⁴ Since the United States could have petitioned the Oklahoma Tax Commission for a refund within one year after the taxes were paid, Oklahoma Statutes § 68-227 (1970 Supp.), the critical date for assessing the "circumstances" as they appeared to the trustee is not the date on which the taxes were paid, but at least one year thereafter. This vitiates the argument of the United States that "in 1967 and 1968, when the United States paid these taxes, a number of the decisions and executive actions relied upon by respondent had not yet occurred." (Brief for the United States, p. 5) By 1969, all these decisions had been made.

Moreover, it is very doubtful that state statutes of limitations apply to actions commenced by the United States on behalf of the Indians. The controlling statute, 28 U.S.C. § 2415(a), (g), suggests that the United States would have until July, 1977, to bring the respondents' claim and the claims of other Osage decedents against the State of Oklahoma.

²⁵ A. SCOTT, LAW OF TRUSTS, p. 1428 (3d Ed. 1967).

exception pertains only where the debatable tax is imposed "in another state for a small amount" and "it would cost more than the amount of the tax to litigate the question."²⁶ Such an exception is plainly inapplicable here. The State of Oklahoma has collected "several million dollars" in estate taxes from Osage allottees since 1956. (Brief of State of Oklahoma, p. 21.) The United States is trustee for over 2,000 Osage headrights of very great value. It is inconceivable that—given the state of the law in the middle and late 1960s—a reasonable man faced with a tax liability of over \$100,000 per annum *on his own property*²⁷ would have desisted from filing litigation to challenge the validity of the tax in these circumstances. True, such an action would have in all likelihood required ultimate resolution by this Court, but the question of law was clear-cut and it seems unlikely that the underlying facts would have been in substantial dispute or required lengthy litigation.²⁸

²⁶ Id., p. 1429 (3d Ed. 1967).

²⁷ The Fund agrees with the United States that a trustee's duty should be *at least* the measure of "care and skill [which] . . . a man of ordinary prudence would exercise in dealing with his own property." (Brief for the United States, p. 7.) In addition, the United States is held as trustee to exercise the special skills and facilities it possesses on the beneficiaries' behalf. A Scott, *Law of Trusts*, p. 1410 (3d Ed. 1967).

²⁸ The suggestion of the United States that failure to pay the tax would "have exposed the trust to penalties and other clouds" (Brief for the United States, p. 12), including the possibility that the land might be sold (Id., p. 7), is extremely unpersuasive. A reasonable alternative would have been to pay the taxes but petition the Oklahoma Tax Commission for a refund. This was the course followed by the government in *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943).

In its brief, the United States candidly acknowledges the existence of a "clear conflict of interest" between its fiduciary responsibility to the Osage Indians and its interest in revenue collection. (Brief for the United States, pp. 13-14.) This latter interest, the United States claims, might be jeopardized if *West* were overruled. As we understand this argument, the United States is concerned that an overruling of *West* might call into question cases where federal taxation of entities claiming immunity as state instrumentalities was sustained.²⁹ The United States acknowledges inconsistencies between the approach in *West* and that in *Squire*, and that "it is important . . . that the law be clarified so that the United States, as trustee, may know whether it remains bound to pay such taxes."³⁰ But despite the conceded importance of seeking this clarification the trustee took no action, and left it in-

²⁹ The United States suggests that the vitality of *Helvering v. Mountain Producers Corp.*, 303 U.S. 376 (1938), could be so undermined. Brief for the United States, p. 14. With all deference, the Fund believes this argument to be far-fetched. In *Helvering v. Mountain Producers Corp.*, *supra*, this Court held that profits from oil and gas production derived from a lease of state lands were not exempt from federal income taxation. The corporation had contended it was an instrumentality of the state by virtue of the lease; the Court held that the lessee must show how the taxation constituted a "direct and substantial interference" with the functions of government to invoke the instrumentality doctrine. 303 U.S. at 386-387. The grounds on which the Court of Claims held *West* should be overruled would leave the Court's rejection of the "instrumentality" doctrine in *West* untouched. We do not understand the Court of Claims or the respondents to suggest that the "instrumentality" doctrine should be revived, but merely that the Indian tax immunity rests upon the distinct and historic basis of the trust responsibility.

³⁰ Brief of the United States, p. 18.

stead to the beneficiaries to commence the litigation that is acknowledged to be necessary.

Failure to act cannot be justified by reference to the trustee's conflict of interest, assuming that such a conflict did exist in the present case. The Departments of Justice and the Interior here subordinated their fiduciary duties to protect the Indian interest to a supposed contrary interest in revenue production.³¹ Such subordination breaches the trustee's obligation of exclusive loyalty to the interests of his beneficiary, which Professor Scott has termed "the most fundamental duty owed by the trustee to the beneficiaries."³²

The Native American Rights Fund recognizes, of course, that executive departments ordinarily possess wide discretion to balance and resolve conflicts between various interests. Indeed, public policy usually is formulated by just that process. But in the unique area of Indian law, the executive departments have been charged with a *fiduciary duty* to protect Indian property rights. This duty sharply limits the otherwise broad discretion of executive officials to balance conflicting social interests.

As a fiduciary, the executive departments must resolve conflicts in favor of providing the maximum reasonable protection for the Indian beneficiary and his property. While the United States is not obligated to espouse claims for which there is no reasonable basis in law or fact, it must advance and protect rea-

³¹ But the Internal Revenue Service did not perceive any such "conflict," for it ceased levying federal estate and gift taxes on Osage allottees in 1969. Rev. Rul. 69-164, 1969, 1 Cum. Bull. 220.

³² A Scott, *Law of Trusts*, p. 1297 (3d Ed. 1967).

sonable claims of the Indians. The rights of the trust beneficiaries may not be subordinated to "the national interest" by executive officials³³ except where Congress has authorized them to do so with the requisite clarity.³⁴ That is the underlying basis of cases such as *Menominee Tribe v. United States*, 391 U.S. 404 (1968) and *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339 (1941), discussed *supra* at p. 6, which hold that where Congress has not expressly provided for the extinguishment of Indian property rights, it shall be presumed to have intended their full protection and preservation. If the executive is to act other than as a most scrupulous fiduciary toward Indian property interests, Congress must have expressly authorized such action. Otherwise, it must be presumed that Congress expects undivided allegiance to the important national policies embodied in the federal trust responsibility.

³³ Compare *Navajo Tribe v. United States*, 364 F.2d 320 (Ct. Cls. 1966), where it was held that the mining of helium by the Bureau of Mines on the Navajo Reservation during the Second World War was unlawful. The Court of Claims observed that the Bureau's action "may have been in the national interest, [yet unlawful because] they were not consistent with the Government's duty to the Navajos." 364 F.2d *supra* at 323-324.

³⁴ Congress alone may alter or abrogate Indian property rights, see *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) *supra*, thus balancing them with other conflicting values in the making of public policy. True, obtaining congressional consent to the taking of Indian property may sometimes be difficult or time-consuming, but Indian property rights are the product of treaty and agreement, protected by the important trusts responsibility. They ought not to be taken lightly or to be subject to loss as a result of executive fiat or subordination. As Mr. Justice Black eloquently observed: "Great nations, like great men, should keep their word." *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (dissenting opinion).

Since the claim of Osage allottees that *West* had been substantially deprived of its vitality by the middle or late 1960s was clearly a reasonable one, it should have been pressed vigorously by the United States.

IV. THIS COURT SHOULD OVERRULE WEST

The United States, therefore, should be liable for any damages caused by its failure to discharge its fiduciary obligations. Of course, the respondents would only have been damaged if the United States would have succeeded in overturning *West* had it brought suit. Because of this, and the continued uncertainty as to the extent of the power of the State of Oklahoma to tax the estates of Osage allottees, this Court must determine the continued validity of *West*. The Fund submits that *West* should be overruled. In essence, our reasons for this conclusion are stated above in Part II of this brief. The analytical approach in *West* sets it apart from the main currents of federal Indian law and from the principles of the historic federal trust responsibility to Indians. Additionally, we note that subsequent decisions have confined the holding in *West* to the narrow fact situation presented by the Osage Allotment Act. *Squire v. Capoman*, 351 U.S. 1 (1956), holds that the General Allotment Act of 1887 affords a broader tax immunity. And in the specific context of state inheritance taxes, the Court of Appeals for the Ninth Circuit has held that allotments created pursuant to the Mission Indian Act should be immune from state taxation. *Kirkwood v. Arcues*, 243 F. 2d 863 (9th Cir. 1957). The Fund can discern no reason in history, law or policy why the Osage allottees should not share in the general tax immunity recognized by these holdings as pertaining to other Indian allottees.

CONCLUSION

For the reasons stated, the decision of the Court of Claims should be affirmed.

Respectfully submitted,

DAVID H. GETCHES

REID PEYTON CHAMBERS

MONROE E. PRICE

1506 Broadway

Boulder, Colorado 80302

